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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re IVY E., a Minor.	C041684
ROBERT G., Petitioner and Respondent, v. KYLE C., Objector and Appellant.	(Super. Ct. No. A3597)

Kyle C. (appellant), the father of the minor, appeals from the judgment declaring the minor free from appellant's custody and control pursuant to Family Code section 7822[1] on the ground that he left her without support and without communication for

[1] Unless otherwise designated, all further statutory references are to the Family Code.

over a year with the intent to abandon her. Appellant claims that the evidence was insufficient to support the trial court's findings under section 7822. We agree and shall reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Stephanie, the mother of the eight-year-old minor, became pregnant with the minor while living with appellant and his parents, Susan and Gary C. Appellant and Stephanie did not marry.

Appellant is unemployed and receives disability benefits. According to a court investigator, appellant "reportedly suffers from Obsessive-Compulsive Disorder, Tourette's Syndrome, Attention Deficit Disorder, Manic-Depressive Disorder, and the damages of illegal drug use."

In November 1996, Susan and Gary, the minor's paternal grandparents, along with Stephanie, were granted a co-guardianship of the minor. The minor then lived with Susan and Gary. Stephanie had regularly scheduled visitation, and appellant had visitation "at the discretion of the guardians."

Appellant lived with Susan and Gary while the latter were co-guardians of the minor. As a result, appellant appeared to have been around the minor "on a consistent basis."

On December 10, 1996, Stephanie married respondent Robert. On January 22, 1997, a judgment was entered adjudicating

appellant as the father of the minor. But no order establishing custody of the minor was filed.

In August 1997, the conditions of the co-guardianship were modified to permit Stephanie to have custody of the minor, with weekend overnight visitation between the minor, on the one hand, and Susan and Gary, on the other.

On November 17, 1997, the trial court terminated the co-guardianship. Still, Stephanie, Susan, and Gary agreed that the minor would continue to visit Susan and Gary at their home under the previously agreed terms.

Susan and Gary had visitation with the minor nearly every weekend for approximately three years. Appellant told the court investigator that he "typically visited his parents every Sunday when he was not living with them" and was around the minor during this period. All in all, appellant was around the minor "on a consistent basis for approximately [five] years until visits were terminated [on] October 16, 2000," according to the court investigator.

However, on October 16, 2000, Stephanie ended all contact with Susan and Gary. In a letter dated October 31, 2000, counsel for Stephanie advised Susan and Gary that "[n]o direct or collateral contacts with [Stephanie] or [the minor] by either of you will be tolerated until further written notice. . . ." According to Stephanie, she had learned that Susan and Gary had been reading a book to the minor about child sexual abuse without Stephanie's permission.

On April 9, 2001, counsel for Stephanie and Robert wrote to counsel for Susan and Gary, indicating a willingness to allow them contact with the minor "if the parties can get along." However, Stephanie was not willing to agree to a court-ordered schedule of visitation. Moreover, the letter warned that if Susan and Gary insisted on having the minor examined for signs of sexual abuse, "said visits will be directly affected."

In July 2001, counsel for Susan and Gary wrote to counsel for Stephanie and Robert on *appellant's* behalf, seeking to negotiate a new visitation agreement. That letter also enclosed correspondence from appellant, in which appellant stated his interest in maintaining contact with the minor and suggested reinstatement of the visitation schedule previously in effect. Appellant wrote: "I . . . feel as if it would be in the best int[e]rest of my daughter . . . if she was able to maintain some kind of relationship with me, her father, and her grandparents . . . . The best way in my estimation to establish this contact would be to have visitation as we had in previous terms. I would appreciate it if we could have help in coming to a quick and comfortable resolution for all concerned."

Counsel also proposed that Stephanie have sole physical custody of the minor, and that Stephanie and appellant have joint legal custody.

In September 2001, appellant sent the minor a card by certified mail, which stated that he wanted to be part of her life, but Stephanie refused to accept delivery.

On October 19, 2001, Robert filed a petition to declare the minor free from parental custody and control pursuant to section 7822. In that petition, Robert also sought the adoption of the minor. The petition alleged that the minor had been left by appellant "in the sole care and custody of [Stephanie] for a period of no less than one year and continuing to date without any provision for the child's support and without communication from the absent parent presumptively with the intent on the part of [appellant] to abandon the child."

The court investigator submitted a report to the trial court recommending that the petition be granted and that the adoption be permitted to proceed.

According to the report, Stephanie told the court investigator that appellant had never telephoned in seven years to speak with her or the minor, and had never sent the minor correspondence. Stephanie also stated that appellant was never with Susan and Gary when they picked the minor up at Stephanie's home for visitation.

Appellant told the court investigator that "he is more of a brother to [the minor], and that they do not have a father-daughter relationship." But appellant also reported that until Stephanie halted the visits a year earlier, he had seen the minor every Sunday at Susan and Gary's home.

The minor told the court investigator that she wanted Robert to adopt her. According to the minor, appellant "never

played with her." The minor did not want to see appellant "because he never paid any attention to her."

At the hearing on the petition, appellant testified that he had made efforts to contact Stephanie about the minor. In addition to the July 2001 letter that counsel had sent to Stephanie and Robert on appellant's behalf, appellant had mailed a card to the minor (in care of Stephanie) in September 2001, in which he stated that he wanted to be a part of the minor's life. But appellant admitted that he had not seen the minor in more than a year and acknowledged that he had never sought a court order for visitation with the minor.

Appellant's monthly income was approximately $750. He had never paid child support. However, according to appellant, neither the district attorney's office nor Stephanie had ever sought any child support from appellant. Appellant did not remember giving the minor any gifts after October 2000.

Stephanie testified that she had moved to Truckee three weeks before the hearing. According to Stephanie, appellant had never contacted her to request a visit with the minor. She had wanted appellant to be in the minor's life, but claimed that she was prevented by Susan and Gary from speaking to appellant. Stephanie did admit that she had received correspondence from the appellant in September 2001, but told the juvenile court that she had refused delivery of the correspondence in part because it appeared to be from Susan. Stephanie also testified that prior to October 2000, she had permitted the minor to have

regular contact with Susan and Gary. Stephanie acknowledged, however, that after ending visits in October 2000, she had made no efforts to establish an alternative visitation arrangement so that appellant could maintain contact with the minor.

Appellant's psychologist, Richard Murwin, testified that appellant lacked "social skills and social assertiveness." According to Murwin, appellant avoided confrontation. He testified that it was difficult for appellant to "initiate things that require[d] face-to-face contact with people or asserting himself." And although the psychologist believed that appellant had the capacity to form an intent to abandon the minor, he did not believe that appellant had done so in this case. Murwin also told the court that appellant was "very bright," with an intelligence quotient of "around 130," but suffered from a personality disorder.

Susan testified that prior to October 2000, she ordinarily had the minor with her twice weekly and that appellant was living in her home during that time. According to Susan, when appellant visited with the minor, their interactions were appropriate. Appellant was present for at least one day of the minor's visits.

Further, Susan never received any response from Stephanie to the letter from appellant's counsel seeking to reestablish visitation with the minor. Susan also denied ever telling Stephanie that she could not contact appellant, and claimed that she never blocked Stephanie's relationship with appellant.

Susan did admit, however, that she had helped appellant mail the card that he had sent to the minor in September. And she told the court that she had assisted appellant when he wished to purchase gifts for the minor.

At the conclusion of Susan's testimony, and after the trial court and the parties had discussed the issue of abandonment, the court ruled in part as follows: "I'm going to make a finding, gentlemen, that [section] 7822 has been established by clear and convincing evidence that the father has, for the requisite one-year period of time, failed to provide for the child's support and did not communicate or failed to communicate with the child, other than a token attempt, with the intent on his behalf, on his part, to do nothing to establish a relationship . . . . There never has been [a relationship] to foster, to encourage or to protect. [¶] If that isn't abandonment, because it doesn't fit with the concept of abandonment, the Court of Appeals [*sic*] is going to have to tell me I'm wrong. They may."

The juvenile court then turned to the issue of whether it would be in the best interests of the minor to terminate appellant's parental rights. At the conclusion of the testimony on that issue, and following argument by the parties, the trial court found by clear and convincing evidence that appellant lacked a parental relationship with the minor and that it was in the child's best interest to terminate the parental relationship.

On June 27, 2002, the trial court entered judgment, declaring the minor free from the custody and control of appellant, on the ground that appellant had left the minor in the custody of Stephanie and Robert "for a period of over one year without any provision for the child's support . . . and without communication from the absent parent, with the intent to abandon the child."

Thereafter, appellant filed this appeal from that judgment.

DISCUSSION

I.

Appellant contends that the evidence is insufficient to support the finding by the juvenile court that he abandoned the minor within the meaning of section 7822. Among other things, he claims that he did not leave the minor, as required under the statute, and that he "did not have the requisite intent to abandon [the minor]."

Section 7822 provides in part: "(a) A proceeding under this part may be brought where the child . . . has been left by both parents or the sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child. [¶] (b) The . . . failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or

parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents."

Accordingly, a finding of abandonment under section 7822 in this case requires satisfaction of each of the following elements: (1) the child must have been "left" by one parent in the care and custody of the other; (2) the child must have been left by that parent without any provision for support *or* without communication for the one-year statutory period; and (3) such acts and omissions must have been done with the intent to abandon the child.

Abandonment is an actual desertion, accompanied with the intention to sever the parental relationship and throw off all obligations arising from said relationship, or a relinquishment with the intent of not claiming one's rights or interests. (See *Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 136; *In re Brittany H.* (1988) 198 Cal.App.3d 533, 549; *In re George G.* (1977) 68 Cal.App.3d 146, 160; *In re Cattalini* (1946) 72 Cal.App.2d 662, 669.) But the requisite intent need only be for the statutory period; a showing of an intent permanently to abandon is not required. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 883-886.)

"'The controlling issue for a finding of abandonment is the subjective intention of the parent.'" (*Adoption of Michael D., supra,* 209 Cal.App.3d at p. 136; *In re Brittany H., supra,* 198 Cal.App.3d at p. 550; *In re Jack H.* (1980) 106 Cal.App.3d

257, 265.) "'[T]he question whether such intent to abandon exists and whether it has existed for the statutory period is a question of fact for the trial court, to be determined upon all the facts and circumstances of the case.'" (*In re Brittany H., supra,* 198 Cal.App.3d at p. 550; accord, *In re B. J. B.* (1986) 185 Cal.App.3d 1201, 1212.) Thus, "[i]ntent to abandon, as in other areas, may be found on the basis of an objective measurement of conduct, as opposed to stated desire." (*In re Rose G.* (1976) 57 Cal.App.3d 406, 423-425, rejected on another ground in *In re Cynthia K.* (1977) 75 Cal.App.3d 81, 85.)

While intent to abandon "may be presumed from failure to provide for or communicate with the minor" by virtue of section 7822, subdivision (b) (*In re Jack H., supra,* 106 Cal.App.3d at p. 264), any evidence contrary to that presumption causes it to disappear and requires the trial court to determine the issue of intent without regard to the presumption (*In re Rose G., supra,* 57 Cal.App.3d at p. 424). But an intent to abandon cannot be based on a failure to provide support, absent a demand for support. (*In re George G.*, *supra*, 68 Cal.App.3d at p. 159.) And financial inability may excuse the failure to provide support for the child. (*Guardianship of Pankey* (1974) 38 Cal.App.3d 919, 932; *Adoption of Oukes* (1971) 14 Cal.App.3d 459, 467.) Still, the statute provides that only token efforts to support or communicate with the child do not disturb the presumption of an intent to abandon. (§ 7822, subd. (b); see *In re B. J. B.*, *supra*, 185 Cal.App.3d at p. 1212.)

The standard of proof in this proceeding is clear and convincing evidence. (§ 7821; *In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

And on appeal, the duty of the reviewing court is to determine whether there is any substantial evidence to support the trial court's findings. (*In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326.) In making this determination, we must decide if the evidence is reasonable, credible, and of solid value, such that a reasonable trier of fact could find abandonment based on clear and convincing evidence. (*In re Angelia P., supra*, 28 Cal.3d at p. 924.)

In this case, the trial court based its decision to free the minor from appellant's custody and control on findings that the appellant had failed to provide for her support *and* failed to communicate with the minor for more than one year with the intent to abandon her.

But under subdivision (a) of section 7822, a finding of *either* the failure to communicate *or* the failure to provide support is sufficient to declare the child free from parental custody, if it is accompanied by an intent to abandon. Accordingly, in reviewing the record, we shall consider whether substantial evidence supports the court's finding of intent to abandon in connection with either a failure to provide support or a failure to communicate for the requisite period of time.

Turning first to the failure to provide support for the minor, the record in this case is wholly inconsistent with a

finding of an intent to abandon the minor. Although it is true that appellant had never paid child support, it is also true that neither Stephanie nor the district attorney's office ever demanded such support. "[F]ailure to contribute to support in the absence of demand does not prove an intent to abandon." (*In re George G., supra,* 68 Cal.App.3d at p. 159.) Further, considering appellant's history of emotional difficulties and lack of employment, it is unlikely that he ever could possess the ability to provide for the financial support of the minor. And financial inability may excuse the failure to pay support for the child. (*Guardianship of Pankey, supra,* 38 Cal.App.3d at p. 932.) Accordingly, there is no substantial evidence of abandonment based on a lack of support. (*Adoption of R. R. R.* (1971) 18 Cal.App.3d 973, 981; see also *In re Susan M.* (1975) 53 Cal.App.3d 300, 308.)

The court also concluded that owing to the lack of communication with the minor, the appellant intended to abandon the minor. The trial court found that appellant's effort to make contact with the minor consisted of "a token attempt."

But "[a] pure quantitative test as basis for a court's finding of 'token' communication is not supported by case law. Rather the court must examine into the genuineness of the [parent's] efforts at communications under all the circumstances." (*In re Jack H., supra,* 106 Cal.App.3d at p. 265.)

In this case, the record contains no evidence to suggest that appellant's limited communications reflected an intent to abandon the minor, that is, that he intended to desert the minor, accompanied with the intention to sever the parental relationship and throw off all obligations arising from said relationship, or that he intended to relinquish the minor with the intent of not claiming his rights or interests. (See, e.g., *Adoption of Michael D., supra,* 209 Cal.App.3d at p. 136; *In re Cattalini, supra,* 72 Cal.App.2d at p. 669.) To the contrary, all of appellant's communications expressed a desire to maintain a relationship and sought the reinstatement of a visitation schedule.

Specifically, counsel for Susan and Gary sent to Stephanie and Robert's attorney a letter *on appellant's behalf* in July 2001, seeking to negotiate a visitation arrangement between appellant and the minor. That letter enclosed correspondence from appellant expressing his interest in maintaining contact with the minor and asking for visitation. There was no response to that letter.

Second, two months later, appellant, with Susan's assistance, sent a card by certified mail to the minor, but Stephanie refused to accept delivery.

Thus, far from showing an intent to desert or relinquish the minor, appellant's communications showed an intent to maintain the relationship, but those communications were rebuffed or ignored. Yet, "'[t]he controlling issue for a

finding of abandonment is the subjective intention of the parent.'" (*Adoption of Michael D., supra,* 209 Cal.App.3d at p. 136.)

Also relevant to the issue of intent is the fact that it was Stephanie, rather than appellant, who *initiated* the action that resulted in the termination of contact between appellant and the minor: Just one year before the petition seeking a finding of abandonment for the statutory one-year period was filed, Stephanie's counsel advised Susan and Gary that no direct or collateral contacts with the minor would be tolerated, although this cut off appellant's means of visitation. That action, however well-intentioned, had the effect of thwarting appellant's visits with the minor under the arrangement employed by the parties, including Susan and Gary, for many years. Put bluntly, Stephanie's termination of the arrangements for appellant's visitation cannot trigger the one-year statutory period for appellant's abandonment in the face of appellant's efforts to maintain visitation during that period. There is simply no evidence -- in appellant's actions or in expert testimony -- upon which to base a finding of an intent to abandon.

To the contrary, appellant's psychologist testified that appellant was capable of forming an intent to abandon the minor, but did not believe appellant had done so here. According to the psychologist, appellant's difficulties, which could be traced back to adolescence, made it difficult for appellant to

take the initiative. We agree with appellant that in light of his condition, his efforts greatly exceeded "token efforts."

Accordingly, we conclude that there was no substantial evidence to support the trial court's finding that appellant intended to abandon the minor based on his failure to communicate with her. (*In re Susan M., supra,* 53 Cal.App.3d at pp. 308-309.)

Although it did not question appellant's sincerity, the trial court believed that a significant factor in the case was that appellant never had a parental relationship with the minor. Respondent agrees, and argues that "the record does not show that the appellant ever took on a parental role with the subject child." But the law does not sanction the termination of one's parental rights based on *abandonment* because the parent is failing to act sufficiently "parental."

Respondent also argues that "[c]oupled with visitation by happenstance at the grandparents[']s home, appearance and reasonable inference indicates little interest on the [a]ppellant's part of being a father to [the minor]." But little interest in acting like a father cannot translate into an intent to abandon the parent-child relationship in the face of five years of continuous contact with the child, followed by express communications seeking visitation with the child after visitation had been terminated by the parent with custody.

We recognize that this case presented a set of difficult circumstances for the trial court and that all of the parties

sought to do what they believed was best for the minor. But that does not allow a finding of an intent to abandon by a parent who communicates by counsel and certified mail during the statutory period an interest not to abandon, but whose communications are ignored.

Nonetheless, we encourage the parties to discuss a resolution of this case which serves everyone's interests and which need not preclude adoption by Robert.

II.

In light of our disposition of this appeal, we need not consider appellant's other contentions, including that the trial court erred in its analysis of the minor's best interests and that it erred in failing to appoint separate counsel for the minor.

DISPOSITION

The judgment is reversed.

KOLKEY, J.

We concur:

BLEASE, Acting P.J.

MORRISON, J.